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IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

L. Q. LINAHAN, WARDEN,
Petitioner,

v.

REBECCA A. MACHETTI
A/K/A REBECCA A. SMITH,
Respondent.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1.

Whether, in light of the decisions of this Court in *Engle v. Isaac*, ____U.S.____, 71 L.Ed.2d 783 (1982) and *United States v. Frady*, ____U.S.____, 71 L.Ed.2d 816 (1982), a federal court when reviewing a state court conviction by means of a habeas corpus proceeding, can decide a claim of unconstitutional jury composition on its merits, without a threshold inquiry as to "cause" and "prejudice" where there is a state procedural rule requiring that all jury challenges are waived if not brought prior to or at the time of trial?

2.

Whether the United States Court of Appeals for the Eleventh Circuit improperly cited *Lefkowitz v. Newsome*, 420 U.S. 283 (1975) and *Newman v. Henderson*, 539 F.2d 502 (5th Cir. 1976) for the proposition that, even in the presence of a state procedural waiver rule, the court could consider Respondent's claims concerning the composition of the grand and traverse juries on their merits?

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OPINIONS BELOW

The published opinion of the United States Court of Appeals for the Eleventh Circuit is reported as *Machetti v. Linahan*, 679 F.2d 236 (11th Cir. 1982). A copy of this opinion is also attached in the appendix to this brief.

JURISDICTION

The judgment of the United States Court of Appeals for the Eleventh Circuit was entered on June 25, 1982. *See Machetti v. Linahan*, 679 F.2d 236 (11th Cir. 1982). A timely petition for rehearing en banc filed by Petitioner Linahan was denied on August 24,1982. (A copy of this order of the United States Court of Appeals for the

Eleventh Circuit is contained in the Appendix.) Petitioner Linahan also filed a motion for a stay of the issuance of the mandate pending this petition for a writ of certiorari which motion was granted through and including October 23, 1982. However, a motion to grant an additional thirty day stay of the mandate was denied by the United States Court of Appeals for the Eleventh Circuit on August 26, 1982. This petition for a writ of certiorari has been filed within the ninety days allowed under 28 U.S.C. § 2101(c), from the entry of judgment by the United States Court of Appeals for the Eleventh Circuit. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

O.C.G.A. § 15-12-162 (Michie 1982), Ga. Code Ann. § 59-803 (Harrison 1977):

> "The accused may, in writing, challenge the array for any cause going to show that it was not fairly or properly impaneled or ought not be put upon him. The court shall determine the sufficiency of the challenge at once. If sustained, a new panel shall be ordered; if not sustained the selection of jurors shall proceed."

O.C.G.A. § 9-14-42 (Michie 1982), Ga. Code Ann. § 50-127(1) (Harrison 1977):

> "Except for objections relating to the composition of a grand or traverse jury, rights conferred or secured by the Constitution of the United States shall not be deemed to have been waived unless it is shown that there was an intentional relinquishment or abandonment of a known right or privilege which relinquishment or abandonment was participated in by the party and was done voluntarily, knowingly, and

intelligently. The right to object to the composition of the grand or traverse jury will be deemed waived under this section, unless the person challenging the sentence shows in the petition and satisfies the court that cause exists for his being allowed to pursue the objection after the conviction and sentence has otherwise become final."

STATEMENT OF THE CASE

Respondent, Rebecca A. Machetti a/k/a Rebecca A. Smith, was convicted of two counts of murder in the Superior Court of Bibb County, Georgia on March 1, 1975. Petitioner received two consecutive death sentences for these offenses following her jury trial. The Supreme Court of Georgia affirmed Respondent's sentences and convictions on direct appeal in *Smith v. State*, 236 Ga. 12 (1976), *cert. denied, Smith v. Georgia*, 429 U.S. 932 (1976). A petition for rehearing was denied in this Court on January 10, 1977.

On January 13, 1977, Respondent filed a petition for a declaratory judgment and/or presentence hearing and stay of execution in the Superior Court of Bibb County, Georgia. This petition was denied and the judgment of the Superior Court of Bibb County, Georgia, was affirmed by the Supreme Court of Georgia in *Smith v. State*, 238 Ga. 655 (1977). A petition for certiorari from this judgment was filed in this Court and denied on October 3, 1977. *See Smith v. Georgia*, 428 U.S. 910 (1977), *rehr. denied*, 429 U.S. 874 (1977).

Respondent filed a petition for a writ of habeas corpus in the Superior Court of Baldwin County, Georgia, on January 9, 1979, raising for the first time a challenge to the composition of the grand and traverse juries. A two day state habeas corpus hearing was held in the Superior

Court of Baldwin County and Respondent's petition for a writ of habeas corpus was denied on May 9, 1979. As will be discussed *infra*, Petitioner claims that the state habeas corpus court considered evidence with reference to the jury composition issues for the purpose of determining whether or not trial counsel was ineffective for failing to challenge the composition of these juries and that the state habeas corpus court's findings did not amount to a determination on the merits of these issues, but rather a determination of whether there was "cause" or "prejudice" under *Francis v. Henderson*, 425 U.S. 536, 542 (1976).

Respondent's application for a certificate of probable cause to appeal was denied by the Supreme Court of Georgia on July 10, 1979. A motion for reconsideration was denied by that court on July 17, 1979. A petition for a writ of certiorari filed in this Court was denied on October 3, 1979.

Respondent then filed a federal habeas corpus petition in the United States District Court for the Middle District of Georgia, Macon Division, in which she again raised her claims relating to the composition of the grand and traverse juries. Petitioner responded to this application for federal habeas corpus relief under 28 U.S.C. § 2254, by stating, *inter alia*, that Respondent had waived her right to challenge the composition of the grand and traverse juries by failing to follow the Georgia procedural rule requiring that a challenge to the array of these juries be made in a timely manner. Nevertheless, the district court did not address the waiver issue, but rather, determined that this Court's decision in *Duren v. Missouri*, 439 U.S. 459 (1979), was not retroactively applicable to Respondent's case so as to authorize a finding of uncon-

stitutional representation as to women in the jury boxes.

Respondent appealed to the United States Court of Appeals for the Eleventh Circuit arguing that *Duren v. Missouri, supra*, was retroactively applicable to her case. Following oral argument, the United States Court of Appeals for the Eleventh Circuit in *Machetti v. Linahan*, 679 F.2d 236 (11th Cir. 1982), rendered a decision addressing Respondent's jury composition claims on their merits, with no reference to Petitioner's waiver argument based on the state procedural rule requiring that all challenges to jury composition must be raised prior to or at the time of trial. A petition for rehearing en banc was timely filed but denied by the United States Court of Appeals for the Eleventh Circuit on August 24, 1982. It is from the decision of the United States Court of Appeals for the Eleventh Circuit, addressing Respondent's jury composition claims on their merits, without a prior determination as to whether there has been waiver under the cause and prejudice standard of *Francis v. Henderson, supra*, that Petitioner now seeks a writ of certiorari from this Court.

REASONS FOR GRANTING THE WRIT

A. WHERE A STATE PROCEDURAL RULE REQUIRES THAT ALL CHALLENGES TO THE COMPOSITION OF THE JURY MUST BE WAIVED IF NOT BROUGHT PRIOR TO OR AT THE TIME OF TRIAL, A FEDERAL COURT CANNOT REVIEW, IN A HABEAS CORPUS PROCEEDING BROUGHT BY A STATE PRISONER, A CLAIM OF UNCONSTITUTIONAL JURY COMPOSITION ON ITS MERITS, WITHOUT A THRESHOLD INQUIRY AS TO "CAUSE" AND "PREJUDICE".

In January of 1975 this Court held in *Taylor v. Louisiana*, 419 U.S. 522 (1975), that a statute automatically excluding women from jury service unless they opted to be included by written request, a so-called "Opt-In Statute" was unconstitutional. In February of 1975, Respondent was tried and convicted in the Superior Court of Bibb County, Georgia. She was sentenced to death on March 1, 1975. That same year, a Georgia statute providing that women were to be automatically included in jury lists unless they opted not to serve, a so-called "Opt-Out Statute", as codified in Ga. Code Ann. § 59-124, was repealed.

As noted in the "Statement of the Case" portion of this petition, Respondent filed no jury challenge at the time of her trial, but later attacked the composition of the grand and traverse juries by means of her petition for a writ of habeas corpus filed in the Superior Court of Baldwin County, Georgia. At the time that Respondent filed her state habeas corpus petition in January of 1979, this Court in *Duren v. Missouri*, 439 U.S. 357 (1979), held that a state statute which allowed women by request to opt-out of jury service, was unconstitutional.

Respondent urged in her state habeas corpus petition that her trial attorney was ineffective for failing to challenge the composition of the grand and traverse juries and that she was deprived of her fundamental right to indictment and trial by a jury selected from a representative cross-section of the community. One of the reasons alleged was that under Ga. Code Ann. § 59-124, which as previously noted was repealed in 1975, any women who did not desire to serve on a jury panel could "opt-out." Although Respondent has asserted and the United States Court of Appeals for the Eleventh Circuit has deter-

mined, that the state habeas corpus court considered the jury composition issues on their "merits" in denying Respondent's petition for a writ of habeas corpus, Petitioner urges this Court to reexamine the order of the state habeas corpus court, in a different light. Specifically, Petitioner submits that although the state habeas corpus court did address the proof presented by the Respondent at the state habeas corpus proceeding with reference to her claims that the grand and traverse juries were non-representative and that counsel had been ineffective for failing to challenge the composition of these juries, the state habeas corpus court's review was, in effect, an examination of the evidence to determine if it met the "cause and prejudice" standard set forth by this Court in *Francis v. Henderson*, 425 U.S. 536, 542 (1976). Petitioner asserts that this is the only fair reading of the state habeas corpus court's order, in light of the timeliness requirement under Georgia law with respect to jury challenges.

The general rule of Georgia procedure has long required a defendant to make a jury challenge at, or before, the time the jury is "put upon him." O.C.G.A. § 15-12-162 (Michie 1982), Ga. Code Ann. § 59-803 (Harrison 1977). *See also Cobb v. State*, 218 Ga. 10, 21-22 (1962). However, Georgia procedure recognizes a "cause" exception to this timeliness requirement, as does federal procedure. *See Simmons v. State*, 226 Ga. 110 (1970) and *Francis v. Henderson*, 425 U.S. 536, 542 (1976).

The cause requirement is also contained in that portion of the Georgia law relating to habeas corpus and provides as follows:

> "Except for objections relating to the composition of a grand or traverse jury, rights conferred or secured by the Constitution of the United States shall not be deemed to have been waived unless it is shown

> that there was an intentional relinquishment or abandonment of a known right or privilege which relinquishment or abandonment was participated in by the party and was done voluntarily, knowingly, and intelligently. The right to object to the composition of the grand or traverse jury will be deemed waived under this section, unless the person challenging the sentence shows in the petition and satisfies the court that cause exists for his being allowed to pursue the objection after the conviction and sentence has otherwise become final."

In *Francis v. Henderson, supra,* this Court held that a federal habeas corpus petitioner must establish not only the requisite "cause" for a failure to challenge the compositions of the grand or traverse juries prior to trial, but must also show "actual prejudice", if these petitioners are to be allowed to raise jury composition issues without complying with the state procedural law providing that all challenges to the arrays of the jury must be timely.

Clearly, as it is not contested that Respondent did not challenge the compositions of the grand or traverse jury at or before the time the jury was put upon her, as required under Georgia law, the state habeas corpus court was required to make a determination as to whether or not Respondent has established "cause" which would exempt her from this timeliness requirement. It appears that the "cause" being alleged by Respondent in her state habeas corpus petition was the ineffective assistance of her trial counsel. Therefore, Petitioner submits that the testimony which was offered with reference to the compositions of the grand and traverse jury was an attempt to establish the requisite "cause" necessitated under Georgia law for untimely challenges and the necessary cause and prejudice required for the consideration of untimely jury challenges as established by this Court's

decision in *Francis v. Henderson, supra.*

Petitioner submits that the state habeas corpus court was forced to examine the jury composition issues on their "merits" to make a determination if cause and/or prejudice had been established by the Respondent. When the state habeas corpus court determined that the Respondent had not shown the significant disparity necessary for finding that the jury was non-representative (see order of the state habeas corpus court, p. 91 in the Appendix), this was in effect a finding that no prejudice had been shown.

Petitioner submits that the next finding by the state habeas corpus court with reference to Respondent's claim that counsel had been ineffective for failing to challenge the composition of the grand and traverse juries, was in effect addressed to whether or not Respondent had established "cause". In finding that counsel was not ineffective for failing to challenge the composition of the grand and traverse juries, Respondent found no "cause" exception to the timeliness requirement for jury challenges under Georgia law.

Petitioner asserts that the fact that there was no explicit finding that Respondent had not established "cause" and "prejudice" does not mean that these issues were heard on their "merits". Rather, Petitioner asserts that the only matter which the state habeas corpus court could properly have determined is whether or not the evidence presented on behalf of the Respondent established the necessary cause and/or prejudice to preclude the court from finding that she had waived any right to make these challenges. On this basis, Petitioner asserts that the United States Court of Appeals for the Eleventh Circuit erred in holding that they could examine the jury composition

issues raised for the first time in the state habeas corpus hearing because the state habeas corpus court had entertained the federal constitutional claims on their merits. *Machetti v. Linahan*, 679 F.2d 236, n. 4 (11th Cir. 1982)

After Respondent had filed her federal habeas corpus petition in the United States District Court for the Middle District of Georgia, Petitioner responded to the show cause order with an answer-response which asserted the state procedural waiver rule as to the jury composition issues. However, the district court found that the United States Magistrate had improperly applied this Court's decision in *Duren v. Missouri*, 439 U.S. 357 (1979), because the district court found that *Duren* was not applicable to Respondent's case because it was decided at a time when Respondent was proceeding with her avenues of collateral review, rather than direct review. Based on the district court's finding that no claim for relief was warranted on the basis of the jury composition issues, Petitioner did not object to the district court's order. However, on appeal to the United States Court of Appeals for the Eleventh Circuit, Petitioner sought a remand to the district court in order to allow the district court to consider all of the legal aspects of Respondent's claims, not for the purpose of presenting any other evidence on the claims on their "merits," in the form of statistical evidence or additional evidence from such witnesses as the jury commissioners. If a remand had been granted from the Eleventh Circuit, Petitioner could have reasserted the waiver claim and offered testimony and/or argument with reference to the issues of "cause" and "prejudice". For example, Petitioner could have submitted evidence relative to the number of women whom the Respondent, through her counsel, struck off of the traverse jury panel at her trial. Petitioner submits that such evidence as this, would be rele-

vant to the question of whether or not cause and prejudice had been established so as to avoid the state procedural waiver rule.

Petitioner contends that the United States Court of Appeals for the Eleventh Circuit should have made a preliminary inquiry as to "cause" and "prejudice" before addressing the jury composition issues on their merits. The failure of the Eleventh Circuit to make this threshold inquiry is in direct conflict with numerous decisions of this Court including the recent opinions of the court in *Engle v. Isaac*, ____U.S.____, 71 L.Ed.2d 783 (1982) and *United States v. Frady*, ____U.S.____, 71 L.Ed.2d 816 (1982).

In *Engle v. Isaac, supra*, this Court considered whether state prisoners could litigate the constitutionality of self-defense instructions given at trial, when such persons had forfeited their right to litigate these claims in the state courts. This Court stated:

> "While the nature of a constitutional claim may affect the calculation of cause and actual prejudice, it does not alter the need to make that threshold showing. We reaffirm, therefore, that any prisoner bringing a constitutional claim to the federal courthouse after a state procedural default must demonstrate cause and actual prejudice before obtaining relief."

Engle v. Isaac, ____U.S.____, 71 L.Ed.2d 783, 801 (1982).

Under this standard, before Respondent could bring her constitutional claims with reference to composition of the grand and traverse juries in her federal habeas corpus proceeding, she would have had to demonstrate "cause" and "prejudice" to exempt her from the state procedural waiver rule and Petitioner asserts this is exactly what the state habeas corpus court found that Respondent had failed to do in rejecting her claims for relief. Therefore,

the federal district court should not have considered these claims on their merits, even though relief was denied on these issues. Additionally, the United States Court of Appeals for the Eleventh Circuit clearly erred in holding that these claims had been considered on their "merits", thereby allowing that court to consider the merits of the claim with no necessity of inquiring into whether or not Respondent could establish cause and prejudice.

Similarly, in *United States v. Frady*, ____U.S.____, 71 L.Ed.2d 816 (1982), this Court found that before a federal court could consider the merits of Mr. Frady's complaint relating to allegedly erroneous jury instructions as to malice, in the presence of a contemporaneous objection rule applicable in the state courts, Mr. Frady had to meet the "cause and actual prejudice" standard enunciated in *Davis v. United States*, 411 U.S. 233 (1973), as extended in *Francis v. Henderson*, 425 U.S. 536 (1976) and *Wainwright v. Sykes*, 433 U.S. 72 (1977).

As in *United States v. Frady, supra*, Petitioner asserts that the proper standard for review by the federal habeas corpus court and the United States Court of Appeals for the Eleventh Circuit was the "cause and actual prejudice" standard and that the court erred in not viewing any evidence presented by the Respondent at the state habeas corpus hearing in light of this standard also codified under Georgia law. The failure of the United States Court of Appeals for the Eleventh Circuit to make this threshold inquiry of cause and prejudice, greatly undermines the validity of the state procedural waiver rule and allows state prisoners to avoid timeliness requirements for jury challenges by having them considered on their merits for the first time by the state habeas corpus court with no necessity of establishing "cause".

B. THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT IMPROPERLY ADJUDICATED RESPONDENT'S JURY COMPOSITION CLAIMS ON THEIR MERITS, IN THE FACE OF A VALID STATE PROCEDURAL WAIVER RULE, CITING *LEFKOWITZ v. NEWSOME*, 420 U.S. 283 (1975) AND *NEWMAN v. HENDERSON*, 539 F.2d 502 (5th Cir. 1976).

The United States Court of Appeals for the Eleventh Circuit reached the merits of Respondent's jury composition claims based on a misinterpretation of this Court's decision in *Lefkowitz v. Newsome*, 420 U.S. 283 (1975). In note 4 of the court's decision it stated the following as being the holding of *Lefkowitz v. Newsome*, *supra*, and *Newman v. Henderson*, 539 F.2d 502, 504 (5th Cir. 1976):

> "Where, however, the state habeas corpus court entertains the federal constitutional claims on the merits, as in the instant case, the federal habeas court must also adjudicate the merits. (cites omitted)."

In *Lefkowitz v. Newsome*, *supra*, this Court found that Mr. Newsome was not barred from presenting issues relating to the lawfulness of a search or the voluntariness of his confession, even where he had pled guilty, because state law permitted a defendant to plead guilty without forfeiting the right to have such constitutional issues as these reviewed. In *Lefkowitz v. Newsome*, Mr. Newsome pled guilty to a drug charge, but under the applicable New York statute, appealed to the state court on direct appeal his federal constitutional claim that evidence seized incident to an unlawful arrest should have been suppressed. This Court found that under these circumstances, Mr. Newsome was not precluded from raising this claim in a federal habeas corpus proceeding. The Court found:

> "Newsome has satisfied all of the prerequisites for

> invoking the habeas corpus jurisdiction of the federal courts. He is no less entitled to federal review of his constitutional claim than is any other defendant who raises his claim in a timely fashion, in accordance with state procedure and who pursues his claim through all available levels of state appellate review."

Id. at 291.

The situation presented to this Court in *Lefkowitz v. Newsome, supra,* is clearly distinguishable from the facts of this case. Respondent has not satisfied all the prerequisites for invoking habeas corpus jurisdiction as to her jury composition claims. Unlike Mr. Newsome, Respondent did not raise her claim in a timely fashion and in accordance with state procedure, but rather raised for the first time in a state habeas corpus proceeding her claims of illegal jury composition. As already noted with respect to the first argument made in this petition for a writ of certiorari, where there has been no compliance with state procedure, there must at least be a threshold showing as to "cause" and "prejudice" before the merits can be reached. *Lefkowitz v. Newsome,* does not provide authority for the United States Court of Appeals for the Eleventh Circuit's consideration of the Petitioner's constitutional claim without some consideration of, at the very least, the issue of deliberate by-pass. Lefkowitz had preserved all of his rights and therefore no showing as to deliberate by-pass or whether he should be exempt from a state procedural waiver rule was necessary. Clearly, *Lefkowitz v. Newsome, supra,* does not permit proceeding to the merits of such claims as that raised by the Respondent, under the circumstances presented here.

Similarly, Petitioner contends that the United States Court of Appeals for the Eleventh Circuit improperly

relied on the prior decision of the United States Court of Appeals for the Fifth Circuit in *Newman v. Henderson*, 539 F.2d 502 (5th Cir. 1976), to reach the merits of Respondent's jury composition claims. In *Newman v. Henderson, supra*, the defendant had been convicted of aggravated rape but had applied for a writ of habeas corpus in Louisiana charging racial discrimination in the selection of the grand jury. He was denied relief based on a finding that the grand jury system prevailing at the time of his indictment had not been discriminatory. However, the district court granted his petition for a writ of habeas corpus finding that the state had failed to rebut the prima facie showing made by the defendant as to grand jury discrimination. On appeal to the United States Court of Appeals for the Fifth Circuit, the court found that the waiver principle of *Davis v. United States*, 411 U.S. 233 (1973), did not bar a federal determination of the merits of Mr. Newman's constitutional claim of grand jury discrimination. This was because the state courts had considered his claim of racial discrimination on its merits. However, it is readily apparent that the facts of *Newman v. Henderson, supra*, are distinguishable from those in the instant case. First, this Court makes no reference to any state procedural waiver rule concerning jury composition claims which exists in the State of Louisiana. Therefore, Mr. Newman was not barred from presenting his claims relating to the selection of the grand jury for the first time in his state habeas corpus proceeding. Additionally, as has been previously argued, the state habeas corpus court in *Newman v. Henderson, supra*, considered his claims on their merits, whereas, in this case, Petitioner contends that the state habeas corpus court only determined that Respondent had not shown "cause" or "prejudice" to allow her claims to be litigated.

The facts in *Newman v. Henderson* and *Lefkowitz v. Newsome* are clearly distinguishable from those presented in this case and are not sufficient authority to allow the federal court on review of a state prisoner's federal habeas corpus action, to proceed to the merits of Respondent's jury composition claim in the presence of a state procedural waiver rule. Therefore, this Court should at least vacate the judgment of the United States Court of Appeals for the Eleventh Circuit and remand the case to the court for further consideration in light of *Lefkowitz v. Newsome, supra* and *Francis v. Henderson, supra.*

CONCLUSION

Because the United States Court of Appeals for the Eleventh Circuit improperly considered the merits of Respondent's jury composition claims, without a threshold inquiry into the issues of "cause" and "prejudice", and thereby, improperly granted Respondent habeas corpus relief, a petition for a writ of certiorari should be granted to review the decision of the Court of Appeals for the Eleventh Circuit.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Susan V. Boleyn, Attorney of Record for the Petitioner, and a member of the Bar of the Supreme Court of the United States, hereby certify that in accordance with the Rules of the Supreme Court of the United States, I have served three copies of the foregoing Petition for Writ of Certiorari upon the Respondent by depositing same in the United States mail with sufficient, first class postage affixed thereto, and addressed to counsel for Respondent as follows:

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This 12th day of November, 1982.

/s/
SUSAN V. BOLEYN